UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UPS SUPPLY CHAIN SOLUTIONS, INC.

and Case 12-CA-144578

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL UNION NO. 769

COUNSEL FOR THE GENERAL COUNSEL'S REPLY TO RESPONDENT'S ANSWERING BRIEF

I. INTRODUCTION

This is General Counsel's reply to Respondent's answering brief to General Counsel's exceptions to the December 24, 2015, Decision of ALJ Dawson in Case 12-CA-144578. General Counsel previously filed exceptions and a brief in support of exceptions. Respondent has also filed a motion to strike General Counsel's exceptions and its own cross-exception to the ALJ's Decision. Simultaneously with this reply brief, General Counsel is filing an opposition to Respondent's motion to strike General Counsel's exceptions (motion to strike) and an answering brief to Respondent's cross-exception.

Preliminarily, Respondent repeatedly asserts, in its answering brief and in its separate motion to strike General Counsel's exceptions, that General Counsel's exceptions do not meet the literal requirements of Section 102.46(b)(1)(iii) of the Board's Rules and Regulations. General Counsel has addressed that meritless claim in our separate opposition to the motion to strike, and therefore does not repeat our position here.

As noted in General Counsel's brief in support of exceptions, the ALJ concluded that UPS Supply Chain Solutions, Inc. (Respondent) did not violate Section 8(a)(1) and (5) of the Act by unilaterally implementing changes to the health benefits of the unit of warehouse employees

at its Doral, Florida facility for the year 2015, during the pendency of negotiations for a first collective-bargaining agreement between Respondent and International Brotherhood of Teamsters, Local Union No. 769 (the Union), the certified bargaining representative of the unit. Accordingly, ALJ Dawson recommended dismissal of the complaint. She reached this conclusion notwithstanding that Respondent has not remedied its violation of Section 8(a)(1) and (5) of the Act regarding changes it made to the 2014 health benefits of the unit employees shortly after the Union was certified, as alleged in Case 12-CA-113671, which is also pending before the Board.

In Respondent's Answering Brief to General Counsel's exceptions and supporting brief, Respondent asserts that the evidence does not support the finding of a violation and that ALJ Dawson's recommendation to dismiss the complaint should be adopted by the Board. This reply brief addresses Respondent's claims. Much of Respondent's answering brief consists of long block quotes from ALJ Dawson's decision. This reply brief is to address several contentions in Respondent's answering brief.

II. ARGUMENT

A. Respondent's repeated claims that General Counsel's exceptions are not supported by record evidence are false.

Throughout its answering brief, Respondent claims that there is no record evidence to support General's Counsel position, and that General Counsel did not except to ALJ Dawson's factual findings. The contention that there is no record evidence to support General Counsel's position is simply false. It is true that General Counsel did not except to the ALJ's findings of fact. Thus, General Counsel relies on the findings of fact found by ALJ Dawson, which are essentially undisputed. Moreover, General Counsel's brief in support of exceptions contains ample citations to the transcript and exhibits in evidence that establish the facts set forth in that

brief and in the ALJ's Decision, and that form the foundation for General Counsel's analysis of the facts and case law.

Where General Counsel differs with both the ALJ and with Respondent is in our analysis of the evidence and the case law. In that regard, our brief in support of exceptions makes well-reasoned arguments for finding that Respondent violated the Act in all respects alleged in the complaint, notwithstanding Respondent's repeated protests to the contrary.

B. Even if Respondent's health care changes are considered a discrete annually recurring event over which Respondent may bargain to impasse on a single issue, its unremedied unfair labor practices in Case 12-CA-113671 preclude a finding that Respondent engaged in good faith negotiations or reached a valid impasse regarding 2015 health benefit changes.

It is questionable as to whether Respondent's health care changes can be considered a discrete, annually recurring event during first contract bargaining. Clearly, Respondent has not established an overall impasse in bargaining for a first contract, as it is undisputed that except for health care negotiations in October 2014, the parties have not discussed health care in terms of an initial contract, wages, or other economics, notwithstanding evidence that they reached tentative agreements on some non-economic contract terms in separate negotiations. In addition, although administered by a third party, the UPS Flexible Benefits Plan is self-insured and therefore Respondent and its parent UPS have control over the costs and available benefits.

However, even if Respondent's health care changes are considered a discrete, annually recurring event, Respondent gave no notice or opportunity to bargain to the Union and violated Section 8(a)(1) and (5) of the Act by unilaterally announcing and implementing the 2014 health benefits changes with respect to the unit employees, as found by ALJ Sandron in Case 12-CA-113671. *Brannan Sand & Gravel Co*., 314 NLRB 282 (1994).

This conduct must be remedied by restoration of the status quo ante, even where, as here, the Employer provides health coverage on a companywide basis covering non-unit employees. *E.I. DuPont de Nemours & Co.*, 355 NLRB 1096 (2010), *Larry Geweke Ford*, 344 NLRB 628 (2005); *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enfd. sub. nom. 308 F.3d 899 (8th Cir. 2002). In *Larry Geweke Ford*, the Board allowed that the employer could litigate in compliance whether this remedy would be impossible or unduly burdensome. Of course, Case 12-CA-113671 is before the Board on the merits, but even if Respondent's claim in the instant case that it would cost $100,000 to $120,000 to restore its 2013 plan for the unit of 37 employees is true (Tr. 156:15-25; 168:4-5), that fails to establish impossibility or undue burdensomeness, particularly for a huge corporation like Respondent.[1]

Yet, as found by ALJ Dawson and admitted by Respondent's chief spokesperson Rodriguez, Respondent maintained that it had no obligation to bargain and ignored the Union's insistence on a restoration remedy at the commencement of bargaining in the instant case on October 12, 2014.[2] (JD 6:4-15; JD 8:26-28; Tr. 165:20 to 166:2; 167:10-20; RX 3).

Respondent's failure to restore the status quo ante had a direct, serious, and pervasive adverse effect on the bargaining process in October 2014, for the reasons specified in General Counsel's brief in support of exceptions at pages 14 to 18.

C. Respondent's overall conduct and the totality of the circumstances show that it bargained in bad faith, thereby precluding a valid impasse.

Again, General Counsel relies on the facts in our brief in support of exceptions, and primarily relies on the argument therein at pages 18 to 22 for our analysis. In its answering brief at page 26, based on the ALJ's finding that Union agent Valero knew the UPS Flexible Benefits

[1] As used herein, "JD" refers to the Decision of ALJ Dawson, "Tr." refers to the official transcript, "GCX" refers to General Counsel's exhibits, and "RX" refers to Respondent's exhibits.
[2] Litigation of Case 12-CA-113671 had commenced before ALJ Sandron on September 14, 2014, before the start of bargaining.

Plan might change every year, Respondent argues that the Union had plenty of time to prepare for negotiations, and that there is no evidence that timing contributed to the parties' failure to reach agreement. This analysis is flawed and misconstrues an employer's obligation to give a union notice and an adequate opportunity to bargain under Section 8(a)(5) of the Act. Valero only knew that the benefits "might" change. He did not know with certainty that they would change, and he certainly did not know what the changes would be. It is undisputed that Respondent failed to inform the Union about the changes it intended to impose until October 8, 2014. (JD 4:7 to 5:11; Tr. 34:19-24, Valero; Tr. 163:15-22, Rodriguez; GCX 4).

Contrary to Respondent's contention, General Counsel does not argue that an employer is required to agree with a union in bargaining. However, good faith bargaining is required, and Respondent's intransigence during bargaining about the changes to its 2015 health benefits, together with its unremedied unlawful changes to the same term of employment in 2014, establishes a failure to bargain in good faith. Respondent extols the virtues of its Flexible Benefits Plan as if that is evidence that makes its conduct lawful. (Respondent's answering Brief at p.6). However, it is undisputed that costs for employees were significantly increased and the Union did not agree with Respondent's view. Accordingly, Respondent was required to bargain in good faith. It did not.

Respondent essentially argues that it engaged in lawful hard bargaining, citing *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984). However, in *Atlanta Hilton* there were no unilateral changes in terms and conditions of employment. 271 NLRB at 1603. That is not the case here, where Respondent had made unilateral changes in health care benefits, the very subject about which Respondent insisted on making further changes for 2015. In addition to the unremedied unilateral change and its intransigence, Respondent's other conduct establishes a lack of good

faith in dealing with the Union about 2015 health benefits changes. As noted above, all of the indicia of Respondent's lack of good faith are fully discussed in General Counsel's brief in support of exceptions.

Finally, Respondent contends that the fact that it reached tentative agreements with the Union about a couple of non-economic provisions in bargaining for an initial collective-bargaining agreement demonstrates its good faith regarding health benefits negotiations. However, those are separate negotiations, and they are separate because Respondent proposed that health care be considered separately. In addition, the record does not establish that Respondent made any concession to the Union in reaching the tentative agreements on contract provisions. Although it is not alleged that Respondent has bargained in bad faith with respect to negotiations for a contract, neither does the fact that the parties reached tentative agreements on contract terms during two years of bargaining negate the conclusion, based on the totality of the circumstances, that Respondent lacked good faith in negotiations about 2015 health benefits.

III. CONCLUSION

In conclusion, Counsel for the General Counsel respectfully submits that the Board should grant General Counsel's exceptions in their entirety.

Dated at Miami, Florida this 3rd day of March, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Counsel for the General Counsel's Reply to Respondent's Answering Brief in the matter of UPS Supply Chain Solutions, Inc., Case 12-CA-144578, was electronically filed with the Executive Secretary of the National Labor Relations Board and served by electronic mail upon the below-listed parties on this 3rd day of March, 2016, as follows:

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